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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958.

No. 604

SKIPS, A/S MARIE BAKKE,
Petitioner,
vs.
OTIS, McALLISTER & CO., a Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW.

The opinion of the Court of Appeals was dated October 10, 1958 and is reported at 260 F. (2d) 181. With this addition respondent adopts the Citations of Opinions Below appearing in the Petition.

QUESTION PRESENTED.

Whether a common carrier subject to the Carriage of Goods by Sea Act, 1936 may utilize an invoice value clause to reduce its liability to an amount less than the actual damages suffered, as measured by the traditional rule of market value at destination.

STATEMENT.

Petitioner, as a common carrier of goods for hire, received a shipment of coffee in good order and condition at Callao, Peru, issued its bill of lading therefor, and agreed to carry the coffee on its vessel Marie Bakke to San Francisco and to deliver it there in the same good order and condition as when received. Upon the arrival of the vessel at San Francisco petitioner failed to deliver 162 pounds of the shipment and delivered 71,097 pounds thereof in a damaged condition due to contamination by a foreign substance during transit. Respondent, the owner of the coffee during the voyage, filed suit for the damage and loss which resulted. Petitioner admitted liability but reserved the right to try the issue of whether respondent's damages should be computed with reference to invoice value or market value. The foregoing facts appear in the agreed statement (Tr. 31) and were so found by the District Court (Tr. 40).

Petitioner claimed that its liability should be limited to invoice value by virtue of an "invoice value clause" in its bill of lading (Tr. 9). Respondent took the position

that the Carriage of Goods by Sea Act prohibited any clause, agreement or other device seeking to limit or restrict liability for cargo damage other than as expressly provided by the Act. It filed exceptions (Tr. 28) seeking to have the bill of lading defense stricken. The District Court overruled the exceptions (Tr. 30) and the case proceeded to trial on the agreed statement. The trial court followed the pre-trial ruling, held the clause valid, and ordered a decree based upon invoice value (Tr. 39).

On appeal, the Court of Appeals for the Ninth Circuit held the clause invalid under Cogsa and reversed the District Court (App. A of Petition, p. 25). The decision held respondent entitled to recover its actual damages, based on market value, rather than damages based on the invoice which were $3,555.83 less.

ARGUMENT.

Section 3(8) of the Carriage of Goods by Sea Act, 1936 prohibits clauses which *relieve* a carrier from liability for cargo damage or which *lessen* such liability otherwise than as provided in the Act. There is no provision in the Act for an invoice value clause. Applying the clause to the facts of this case would lessen petitioner's liability by $3,555.83. The Court of Appeals held that such a result is prohibited by Cogsa. The basic simplicity of the case cannot be obscured by petitioner's efforts to create conflict where none exists or to inflate the importance and impact of the decision below.

I. THERE IS NO CONFLICT OF DECISION.

The Court of Appeals has held petitioner's invoice value clause void as one lessening liability in a manner not sanctioned by the Carriage of Goods by Sea Act. In so holding, the Court stated expressly that Cogsa has changed the rule of decision which obtained under the Harter Act. It is therefore surprising to find petitioner asserting conflict between that decision and *The Ferncliff*, 306 U.S. 444, which was decided twenty years ago *under the Harter Act.* The claim of conflict is even more surprising in view of the dictum in the *Ferncliff* opinion which clearly foreshadowed the result herein and which was relied upon by the Court of Appeals in reaching its decision. In upholding an invoice clause under the Harter Act, this Court noted that "The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act . . ." (306 U.S. at p. 450).

The Harter Act provided in general terms against clauses *relieving* the carrier from liability for negligence. It said nothing about valuation or measure of damages. Carriers devised various forms of clauses which had the effect of limiting or measuring cargo recoveries by reference to the invoice value instead of the market value, which is customarily higher. In the absence of any statutory guide, the courts were forced to develop their own rules of policy by which to judge the validity of such clauses. The result was a steady stream of litigation as the carriers designed new clauses to take the place of those which were declared invalid. That unsatisfactory situation, among others, led to the enactment of

Cogsa in 1936. The new Act is much more comprehensive than Harter. Where Harter said nothing about valuation, Cogsa covers it specifically, by providing a statutory valuation (46 U.S.C. Section 1304(5); Petition, pp. 2-3) and by prohibiting clauses relieving the carrier from liability "*or lessening such liability otherwise than as provided in this Act . . .*" (46 U.S.C. 1303(8), Petition, p. 2, emphasis added). Section 1304(5) and the quoted language from Section 1303(8) are entirely new and have no counterpart in the Harter Act. Their obvious purpose was to put an end to the litigation over valuation clauses by enacting a statutory clause and outlawing all others. That purpose was recognized by the *Ferncliff* dictum, quoted above, which pointed out that the question of invoice valuation had been laid to rest by Cogsa.

The second decision with which petitioner asserts conflict is *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236 (1952) (*The Esso Belgium*) (Petition, p. 16). That case had nothing to do with damages or valuation, but was concerned with the "both to blame" clause which purported to create an affirmative obligation on the part of cargo to indemnify the carrying vessel. Obviously there can be no "direct conflict" between that case and this.

We understand petitioner's argument to be that certiorari is justified here because the Court of Appeals "completely ignored the question of Congressional intent" and thus departed from the rule of the *Esso Belgium*. That argument is perplexing. The first place to look for Congressional intent is the language used in the statute. The Court of Appeals, in a unanimous

opinion, examined and discussed the pertinent provisions of Cogsa, section by section, and held that the intent to outlaw petitioner's clause was clearly defined by the language used. In reaching its conclusion the Court had before it the hearings and reports of both the Senate and the House, material which was discussed extensively in the briefs of both parties. The committee proceedings refer to "valuation" and "limitation" clauses (using the terms interchangeably) and clearly indicate that no such clause will be valid unless in accord with the express provisions of Cogsa.[1] In the Department of Commerce memorandum submitted to the House Committee, (referred to on pages 15 and 16 of the Petition) it was stated that the maximum value feature of the bill "*prohibits the fixing by contract of even the actual value if that is under $500.*" (*House Hearings*, p. 14, emphasis added). The Committee was thus advised that Cogsa would prohibit the very type of clause which petitioner seeks to defend. The legislative history confirms the clear meaning of the language in the Act. To say that Congressional intent was "completely ignored" is preposterous.

In *The Esso Belgium* the situation was quite different. The Act said nothing about the problem there involved and the legislative history was inconclusive. The difference between the invoice value clause and the both to

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[1] *Hearing before the Committee on Commerce*, United States Senate, 74th Congress, First Session, on S. 1152, page 37; *Hearings before the Committee on Merchant Marine and Fisheries*, House of Representatives, 74th Congress, Second Session, on S. 1152, pages 14, 25, 60, 88; *House Report No. 2218*, 74th Congress, Second Session, pages 6-7.

blame clause is that Congress legislated in one field but not in the other. As with the *Ferncliff*, there is no conflict of decision but rather a statutory difference, which is no ground for certiorari.

It is an admitted fact that no conflict exists between the Court of Appeals' decision and any other decision by any court dealing with valuation clauses under Cogsa. We are aware of no case upholding any such clause, and petitioner cited none in the petition or in the courts below. On the contrary, all valuation clauses which have come before the courts under Cogsa have been uniformly condemned, including two which were virtually identical with petitioner's clause. Those two were held void in *American Trading Co. v. SS Harry Culbreath*, 1952 A.M.C. 1170 (S.D.N.Y. 1951) and *Nabob Foods Ltd. v Cape Corso* (owners), 1954 Lloyds Law List Reports, Vol. II, p. 40 (Exchequer Court of Canada). The Canadian case was decided under the English Carriage of Goods by Sea Act 1924, but, as pointed out in the Court of Appeals' opinion, (Petition, p. 22) it is persuasive authority since the statutes are identical, both having been derived from the Brussels Convention of 1924. In addition there is a closely analogous decision by the Second Circuit, *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F. (2d) 603 (1946), condemning a clause on cargo valuation as one lessening liability otherwise than as provided in the Act. Certiorari was denied (329 U.S. 774).

The *Ferncliff* rule has been changed by legislative action. The change was recognized by the *Ferncliff* dictum. The Court of Appeals' decision is consistent with

that dictum, and with the holdings of those jurisdictions which have passed upon the validity of valuation clauses under Cogsa. There is no conflict which warrants the granting of the writ.

II. THE PETITION OVERSTATES THE IMPORTANCE OF THE CASE.

Respondent concedes that the case has a degree of importance to those directly involved in the carriage of goods by sea in foreign commerce, and to their underwriters. Whether it involves a question of substantial public interest within the certiorari jurisdiction of this Court, however, is open to doubt.

Petitioner's quotes from respondent's brief below, and from other non-record material, have been taken out of context and are therefore misleading. The decision of the District Court, in upholding a clause previously condemned by the *Harry Culbreath* and *Cape Corso* decisions (supra, p. 7) had created an intolerable situation. If permitted to stand, it would have meant that the clause was valid on the Pacific Coast even though it was invalid in New York and Canada. The "importance" of the case in the Court of Appeals was to correct the error of the District Court and restore the intended uniformity under Cogsa and the Hague Rules. That result has now been accomplished.

The statement (Petition, p. 7) that the Court of Appeals' decision invalidates long-standing practices in claims adjustment does not bear analysis. Neither that decision nor Cogsa says anything about claims adjust-

ments, and the parties to a bill of lading dispute are as free as they ever were to settle cases on whatever terms may seem expedient. The Court of Appeals does hold that the carrier may not avail itself of an invalid clause when its liability is the subject of determination by a court of law. Far from being a departure from "long settled practice," that decision is in accord with unanimous authority from other jurisdictions.

If petitioner wishes to complain of the "divided rule" (Petition, pp. 8-9), under which invoice value clauses are invalid under Cogsa but valid under the Harter Act, its complaint should be directed to Congress. The foregoing is only one of several differences between the two statutes. The 1936 Act also changed the rules concerning time to file claim and suit, burden of proof, and the effect of unseaworthiness. The differences are not surprising, since a prime reason for the passage of Cogsa was to correct abuses and inequities which had developed under the Harter Act, and thus to achieve, in the field of foreign shipping, uniformity with those nations which had adopted the Hague Rules.

Unlike other bill of lading cases in which certiorari has been granted, this case does not call for a definition of policy or for the statement of a general rule which would be relevant to a dispute arising outside its four corners. All that is at issue is the validity of a particular clause, a question of insufficient moment to warrant review by this Court.

III. THE DECISION BELOW IS CLEARLY CORRECT.

A carrier's liability for loss or damage to goods normally is based upon market value at destination. *Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494 (1935). Ocean carriers have long sought to avoid that rule by the use of clauses lessening their liability from market value to invoice value or other artificial measure. These clauses assumed various forms, even though their intended effect was the same—to lessen the carrier's liability. Prior to Cogsa their validity was determined by whether the particular language used constituted a "valuation clause" or a "limitation clause." *Ansaldo San Giorgio I*, supra; *Ferncliff*, supra. The desire for a more equitable rule contributed to the enactment of Cogsa in 1936.

The 1936 Act laid down a *statutory* rule on valuation of cargo (46 U.S.C. Section 1304(5)), by virtue of which Congress preempted the field and deprived the carriers of their pre-existing power to control the subject by bill of lading clauses. Having done that, Congress then made its intention clear by providing in Section 1303(8) that no other device lessening the carrier's liability would be permitted.

The solution adopted by Congress was a wise one. It replaced the vague guide of "limitation" versus "valuation" with the concrete test of the effect of a clause in a given case. If it lessens the liability it is void.

Petitioner is mistaken in claiming that the Court of Appeals "tested the legality of true valuation clauses by the standards applicable only to limitation clauses." (Petition, p. 11). The Court of Appeals properly ignored

the distinction between the two types of clauses, which is no longer controlling, and applied the Cogsa test by looking to the *effect* of petitioner's clause.

The source of petitioner's dissatisfaction is not the Court of Appeals' decision but the Act itself, which changed the prior law. Federal and international uniformity of decision in recognition of that change has now been established. Uniformity is evidence of correctness. Further review by this Court would serve no useful purpose.

CONCLUSION.

That the petition for certiorari should be denied for the foregoing reasons is

Respectfully submitted,

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Dated, January 20, 1959.